1992

Brian Burns v. Cannondale Bicycle Company, the Bicycle Center, and John Does I through V : Brief of Appellee

Utah Court of Appeals

Darwin Hansen; Morgan & Hansen; Gary Ferguson; Williams & Hunt.
Edward T. Wells; Robert J. Debry & Associates; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BRIAN BURNS,	:	
Plaintiff/Appellant,	:	BRIEF OF THE APPELLEE/ CROSS-APPELLANT
vs.	:	Case No. 920708-CA
CANNONDALE BICYCLE COMPANY, THE BICYCLE CENTER, and JOHN DOES I THROUGH V,	:	Dist. Court No. 900901567
Defendants/Appellees/ Cross-Appellants.	:	Category 15

APPEAL FROM DISTRICT COURT ORDER
GRANTING SUMMARY JUDGMENT TO DEFENDANT
FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE HOMER WILKINSON

Gary B. Ferguson No. 1062
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145
Attorneys for Defendant/Appellee

Edward T. Wells No. 3422
ROBERT J. DeBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Attorneys for Plaintiff/Appellant

Darwin C. Hansen, No. 2058
Randall D. Lund, No. 5617
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, Ut 84101
Attorneys for Defendant/Appellee

IN THE UTAH COURT OF APPEALS

BRIAN BURNS, Plaintiff/Appellant, vs. CANNONDALE BICYCLE COMPANY, THE BICYCLE CENTER, and JOHN DOES I THROUGH V, Defendants/Appellees/ Cross-Appellants.	: : : : : :	BRIEF OF THE APPELLEE/ CROSS-APPELLANT Case No. 920708-CA Dist. Court No. 900901567 Category 15

APPEAL FROM DISTRICT COURT ORDER
GRANTING SUMMARY JUDGMENT TO DEFENDANT
FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE HOMER WILKINSON

Gary B. Ferguson No. 1062
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145
Attorneys for Defendant/Appellee

Edward T. Wells No. 3422
ROBERT J. DeBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Attorneys for Plaintiff/Appellant

Darwin C. Hansen, No. 2058
Randall D. Lund, No. 5617
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, Ut 84101
Attorneys for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute and Rules

IN THE UTAH COURT OF APPEALS

BRIAN BURNS,	:	
Plaintiff/Appellant,	:	BRIEF OF THE APPELLEE/ CROSS-APPELLANT
vs.	:	Case No. 920708-CA
CANNONDALE BICYCLE COMPANY, THE BICYCLE CENTER, and JOHN DOES I THROUGH V,	:	Dist. Court No. 900901567
Defendants/Appellees/ Cross-Appellants.	:	Category 15

APPEAL FROM DISTRICT COURT ORDER
GRANTING SUMMARY JUDGMENT TO DEFENDANT
FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE HOMER WILKINSON

STATEMENT OF JURISDICTION

This is an appeal from a district court order granting a Motion for Summary Judgment for The Bicycle Center ("BC") from the Third District Court of Salt Lake County, State of Utah. This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2 (1992).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Plaintiff has stated the issues regarding his appeal in his opening brief. BC sets forth the following issues regarding its cross-appeal:

1. Did the trial court abuse its discretion by granting Plaintiff's motion for a protective order with respect to Plaintiff's business records absent a showing of "good cause"?

2. Is there an ethical obligation and/or duty on the court and attorneys, as officers of the court, to disclose to the appropriate agencies, information found in documents produced during discovery which provide a prima facie case of violations of the laws of the State of Utah?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following rules and statutes are applicable to issues on cross-appeal.

1. Utah R. Civ. P. 26(c)(7) - Protective Orders:

> (c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown [emphasis added], the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

2. Utah Code Ann. 58-12-53(15) (1990), Unprofessional Conduct:

(15) Any conduct or practice, contrary to the recognized standards of ethics of the chiropractic profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or public, or any conduct, practice or condition which does or might impair the ability to practice chiropractic safely and skillfully.

3. Utah Code Ann. 58-12-52(1)(a) (1990):

(1) The director of the division, upon the written recommendation of the board, may suspend, revoke or refuse to renew any license to practice chiropractic in this State, or may place the licensee on probation in the following cases:

(a) If the applicant or licensee is not of good moral character or has been guilty of unprofessional conduct;

4. Utah Code Ann. 58-12-35(1)(a) (1990):

(1) The director upon the written recommendation of the board, shall deny an application for a license to practice medicine or shall discipline a physician licensed or otherwise lawfully practicing in this State in the following cases:

(a) If the applicant or licensee is not of good moral character or has been guilty of unprofessional conduct as defined in this Act:

5. Utah Code Ann. 58-12-36(9) (1990):

"unprofessional conduct" as relating to the practice of medicine includes:

(9) Aiding and abetting the practice of medicine by one not licensed or by one whose license is suspended; or practicing as a partner-agent, or employee of , or in joint venture with, any person who does not hold a license to practice medicine within this State;

STATEMENT OF THE CASE

This is a personal injury action wherein the Plaintiff, Dr. Brian Burns, alleges that he sustained injury to his left wrist, neck, lower back, and head as a result of a bicycle accident that occurred on August 16, 1986. Plaintiff asserts that the Cannondale bicycle manufactured by Defendant Cannondale Bicycle Company ("CBC") that he was riding was defective, causing him to go over the handlebars while he was traveling at approximately twenty-five miles an hour on the bicycle. The bicycle was sold to him by BC. Both defendants deny that the bicycle was, in any way, defective. Both defendants assert that the accident occurred as a result of Dr. Burn's conduct. (R. 395).

RELEVANT FACTS OF THE CASE

BC is in agreement with the Plaintiff's statement of facts with the exceptions and additions set-forth below:

STATEMENT OF DISPUTED FACTS

1. BC repaired and discarded the defective parts which had caused the malfunction. (Plaintiff's Brief, Page 6 ¶ 6).

Response: This statement is nothing more than unsubstantiated speculation. Not only has Plaintiff failed to show any causal relationship between the allegedly "defective parts" and his accident, but the Plaintiff has also failed to introduce any admissible evidence which would demonstrate: (1) that there were

"defective parts" on the bicycle in question; or (2) that said parts were "discarded" by BC.

2. Mr. Blomquist admitted that a defect in the bicycle had caused the accident. Plaintiff's Brief Page 8, Para. 12, Fn. 1.

Response: The Plaintiff incorrectly states that Mr. Blomquist "admitted that a defect in the bicycle had caused the accident." Conversely, it can only be said that Plaintiff claims that Mr. Blomquist admitted to him during a conversation at BC's store that a "malfunction" in the bicycle had caused the accident. (R. 533). More importantly, BC's owner, Mr. Blomquist, testified in his deposition that "[t]here were no problems" with the bike when he examined it after the alleged accident. (R. 512-513 & 572). Consequently, aside from Plaintiff's assertion that Mr. Blomquist admitted to him that there was a "malfunction" in the bike, there is no evidence in the record indicating: (1) that there was a specific defect in the bicycle or one of its components at the time it was manufactured by Cannondale Bicycle Company ("CBC"); (2) that there was a defect in the bicycle or one of its components at the time is was assembled by BC; or (3) that the accident was proximately caused by an unreasonably dangerous defect in the bike or one of the components on the bike.

STATEMENT OF ADDITIONAL RELEVANT FACTS

1. Although the accident complained of occurred on August 16, 1986, Plaintiff did not commence this action until August 16, 1989 (i.e, three years after the accident). (R. 005).

2. From the date the Complaint was filed, both parties participated in discovery through June 19, 1992, the date discovery ceased by order of the trial court dated January 15, 1992. (R. 453-454).

3. In bringing this action, the Plaintiff alleged that the subject accident was caused by a defective and dangerous condition in the front brake of his bicycle, to wit:

> [T]he brake spring for the front brakes of the bicycle popped off, causing the brakes to clamp down on the front tire of the bicycle. (R. 003).

4. In exploring the impact such a defect would have on the bicycle, the expert consulted by the Plaintiff and his friend, Todd Bradford, informed the Plaintiff and Mr. Bradford that the loss of the front brake spring, as alleged by the Plaintiff in his complaint, would have the opposite effect alleged, to wit: the loss of the spring would cause the brakes to separate away from the rim such that even if the spring had "popped off," it would not be a probable cause of the accident. (R. 500).

5. By way of an affidavit prepared and signed by Plaintiff's attorney Edward T. Wells of Robert J. Debry and Assoc., and filed with the trial court and served on defense counsel moments prior to

the hearing on CBC's and BC's motion for summary judgment, Plaintiff's counsel ignored the fact that Plaintiff's own expert witness informed him that the brake was not a "probable cause" of the accident. Instead, Mr. Wells testified in his affidavit that:

> Plaintiff is unable to file affidavits in opposition to the pending summary judgment issues from expert witnesses because the defective part which allegedly caused plaintiff's injury is unavailable for inspection by an expert witness.
>
> Plaintiff claims the defective part or parts were discarded by defendant, The Bicycle Center, while acting as agent for warranty repairs for defendant Cannondale Bicycle Company.
>
> Plaintiff has produced testimony to support the spoilation claim, but due to the spoilation of evidence cannot produce evidence of the actual defect.

(R. 590-591)(emphasis added).

6. In the Plaintiff's deposition, he asserted that he sustained loss of income as a result of the bicycle accident in excess of $250,000. The defendants requested that the plaintiff produce his business records, and those of Burns Chiropractic Clinic, Inc., in order to determine the accuracy of this claim. The records were formally requested from Dr. Burns through a Request for Production of Documents.

7. The records of Burns Chiropractic Clinic were obtained using a Subpoena Duces Tecum. Five pages were produced on October 7, 1991, by Dr. Burns' accountants, Sorensen, Chido & May, pursuant to a Subpoena Duces Tecum served upon them on September 23, 1991.

For the most part, the records that were the subject of the Plaintiff's Motion for Protective Order are financial records that were produced on August 9, 1991, and September 12, 1991. The documents produced on August 9, 1991, were produced pursuant to a Request for Production of Documents sent to Dr. Burns. The documents produced on September 12, 1991, were produced pursuant to the Subpoena Duces Tecum and Notice of Records of Deposition served on the Burns Chiropractic Clinic, Inc. (R.397).

8. The only stipulation reached regarding the protection of information obtained through discovery is found in pages 124 and 125 of Dr. Burns' deposition. (R. 413-14). In that stipulation, counsel for the respective parties agreed that Dr. Burns' concept of "working smarter," as outlined in the deposition, would be included in a sealed portion of the deposition which would be kept confidential and used only in this litigation only. Specifically, the parties stipulated:

> Mr. Hansen: Let's go back on the record then and let me restate what I understand the agreement is. With respect to the deposition from this point forward, it is agreed by all counsel and the deponent that the deposition from this point forward will be sealed with the exception of the employees of State Farm, employees of Aetna Insurance, employees of the law firm of Morgan & Hansen, employees of the law firm of [Williams & Hunt]. (R. 421).

9. As set-forth above, the terms of the stipulation entered into by counsel during Plaintiff's deposition relate only to the sealed portion of the deposition. No agreement or stipulation was

entered into with respect to the business records of Plaintiff or his business, Burns Chiropractic, Inc., which were produced pursuant to subsequent discovery requests by the defendants.

10. At no time prior to October 29, 1991, did the Plaintiff seek a protective order from the court regarding the financial records Plaintiff is seeking to keep confidential. In fact, the documents that Plaintiff seeks to keep confidential were produced six to eight weeks prior to filing a Motion for Protective Order. (R. 398).

11. The documents that the Plaintiff hopes to protect establish a prima facie case of violation by Dr. Burns and Dr. Robert Morrow, an orthopedic surgeon, licensed to practice medicine in the State of Utah, of their respective professional licensing standards. The records further establish a prima facie case of perjury on the part of Dr. Burns when compared with his deposition testimony. (R. 413-14).

12. Dr. Burns testified that he had no fee-sharing arrangement with Dr. Morrow. The documents show otherwise. (R. 414).

13. Dr. Morrow is an orthopedic surgeon who has his professional office in the same building as one of Dr. Burns' chiropractic clinics and is, in fact, a treating physician for Dr. Burns' in this case. (R. 398).

14. After the documents were produced on September 12, 1991, Plaintiff's counsel requested that defense counsel not disclose those documents to anyone other than staff in defense counsel's office working on the case, and clients. Defense counsel agreed to do so in order to allow Plaintiff's counsel time to file a Motion for Protective Order.

Therefore, based on the foregoing, BC disputes Plaintiff's specific statements concerning the relevant facts of this case as indicated above and further asserts that the additional facts numbered, 1 through 14 above, are essential to a proper understanding of the issues advanced in Plaintiff's Brief and for consideration of BC's cross-appeal.

SUMMARY OF ARGUMENT

The fact that BC's owner, Philip Blomquist, allegedly admitted that a "malfunction" in the bike caused the accident does not preclude summary judgement because even if it is assumed, arguendo, that such an admission was made, it does not provide the Plaintiff with evidence whereby he can meet his burden of proof on the specific elements of his products liability cause of action. Consequently, the trial court properly deemed the alleged admission to be "immaterial" in granting summary judgement in favor of BC.

Because the elements of a product liability claim are essentially identical to that of a breach of implied warranty claim, the Plaintiff has also failed to demonstrate a genuine issue of material fact with respect to his breach of implied warranty claim and the summary judgement in favor of BC was proper.

The mere fact an accident has occurred does not, in and of itself, support an inference that a defendant was negligent. Consequently, because there is no evidence that the subject bicycle, or any component thereon, was defective at the time of the accident or that a defect was the proximate cause of the action, there is no evidence to support Plaintiff's breach of express warranty claim and negligent assembly claim.

Plaintiff's claim of evidence spoilation is without merit because: (1) there is no evidence BC knew of Plaintiff's claim and, pursuant thereto, intentionally discarded evidence; (2) there is no legal presumption of a defect when a repair person replaces a part on a piece of equipment; (3) a repair person does not have a duty to retain parts of equipment that are replaced when a product is serviced; and (4) even if it is assumed, arguendo, that evidence was discarded, there is no evidence in the record supporting Plaintiff's products liability claim or his claim that the part purportedly discarded was material to the establishment of Plaintiff's product liability claim.

The trial court erred in protecting the documents of the Burns Chiropractic Clinic, Inc., because the Plaintiff failed to demonstrate that there was "good cause" for the protective order. Additionally, there is no support for the Plaintiff's conclusion that the parties had stipulated to protect the documents during the Plaintiff's deposition. During the deposition, the parties agreed to seal a portion of the deposition. The parties did not agree that all documents regarding the Plaintiff's business would not be discoverable.

The Plaintiff waived his right to a protective order regarding the documents involved because he produced the documents prior to seeking the protective order. Rule 26(c), which the Plaintiff relied upon before the trial court, contemplates that a protective order will be sought before the documents are produced.

The documents sought to be protected reveal that Dr. Burns and Dr. Morrow had a fee sharing arrangement. Such an arrangement violates Utah professional licensing standards and could subject both Dr. Burns and Dr. Morrow to discipline by the Utah Department of Professional Licensing. The ethical standards accepted by both attorneys and judges require that they report any unprofessional conduct to the appropriate authorities. Moreover, these documents call into question Dr. Burn's credibility since Dr. Burns testified in his deposition that no such fee sharing arrangement existed.

ARGUMENT

POINT I

ALTHOUGH FACTS AND INFERENCES BEFORE THE COURT ARE TO BE CONSTRUED IN FAVOR OF THE PARTY OPPOSING SUMMARY JUDGEMENT, THE MERE EXISTENCE OF ISSUES OF FACT DOES NOT PRECLUDE SUMMARY JUDGEMENT: ISSUES OF FACT MUST BE MATERIAL TO THE APPLICABLE RULE OF LAW

Rule 56 of the Utah Rules of Civil Procedure requires that a motion for summary judgment be granted only when there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982). Where there is no genuine issue as to any material fact, the Utah Court of Appeals reviews the trial court's conclusions of law for correctness. Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445, 446 (Utah App. 1989).

The Plaintiff contends that a genuine issue of material fact exists in this case because, on the one hand, BC and CBC presented experts who testified that defective front brakes on the bicycle could not have caused the accident while, on the other hand, the owner of BC allegedly admitted that a "malfunction" in the bike caused the accident. (Plaintiff's Brief, p. 15)

However, even if it is assumed, arguendo, that BC's owner admitted that a "malfunction" in the bike caused the alleged accident, such an admission does nothing to advance the Plaintiff's personal injury action because such an admission does not provide

the Plaintiff with any evidence whereby he can meet his burden of proof as to any specific element of his products liability claim.

A. The Mere Existence of Issues of Fact Does Not Preclude Summary Judgment: The Issues Must Be Material To The Cause of Action.

It has long been recognized by both federal and state courts that the mere existence of issues of fact does not preclude summary judgment if those issues do not pertain to an element essential to the opposing party's case. This important principle is most eloquently set-forth in the United States Supreme Court's decision in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), wherein the Court stated:

> In our view, the plain language of Rule 56(c) mandates that entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Id. at 322-23 (emphasis added).

In interpreting Rule 56(c) of the Utah Rules of Civil Procedure, which follows the federal version of Rule 56(c) verbatim, the Utah Supreme Court held in Horgan v. Industrial Design Corp., 657 P.2d 751 (Utah 1982), that:

> [T]he mere existence of genuine issues of fact in the case as a whole does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case.

Id. at 752 (emphasis added).

Elaborating on the standard set-forth in Horgan, the Utah Supreme Court stated in Norton v. Blackham, 669 P.2d 857 (Utah 1983), that:

> Although the facts and the inferences from the facts properly before the court are to be construed in favor of the opponent on a motion for summary judgment, the mere existence of issues of fact does not preclude summary judgment. The issues of fact must be material to the applicable rule of law.

Id. at 859 (emphasis added).

B. Evidence Of A Malfunction Is Immaterial In Context of a Products Liability Action Because The Plaintiff Must Prove, By A Preponderance Of The Evidence, That A Dangerous And Defective Condition Existed When The Plaintiff Purchased The Product.

In order to state a Prima Facie case for products liability against BC, the Plaintiff must show that his injuries were "caused" by a defective and unreasonably dangerous condition in the Cannondale SR-600 (the "Bike") or, more specifically, the Diacomp 400 front brake (the "Brake") on the Bike. Section 402A of the Restatement (Second) of Torts, which was specifically adopted by the Utah Supreme Court in Hahn, Inc. v. Armco Steel Co., 601 P.2d (Utah 1979), states, in pertinent part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . .

Similarly, the Utah Product Liability Act requires the plaintiff prove that a "defect or defective condition in the

product" existed at the time it was "sold by the manufacturer or initial seller." Utah Code Ann. §78-15-6 (1992).

Pursuant thereto, the Plaintiff alleged in his Complaint that the Bike was defective because "the brake spring for the front brake popped off, causing the brakes to clamp down on the front tire of the bicycle" which in turn "caused the bicycle to stop immediately". (R. 003). However, after three years of discovery, the record is devoid of any evidence substantiating Plaintiff's allegations.

For example, despite alleging that the brake spring "popped off," the Plaintiff admitted in his answers to interrogatories that he did not see this happen, but instead stated that "I **feel** that there was a defect in the front brakes due to the fact that I went over the handle bars so abruptly. (R. 156)."

Of those persons who inspected the bicycle following the accident, (i.e. Plaintiff's friend and associate, Todd Bradford, and Philip Blomquist, the owner of BC), neither indicated that the front brake spring had popped off, was missing, or was otherwise broken. Conversely, Mr. Bradford stated that he could not identify a specific defect in the bike because "I'm not a bike professional, or expert . . ."[1] and Mr. Blomquist testified that the Brake spring

---

[1] R. 542.

had not "popped off" because it was on the Bike when he examined it after the accident. Specifically, Mr. Blomquist testified:

> Q. Do you recall any conversation where you mentioned to him that you felt the spring had not worked properly or had broken and that was the cause of the calipers crimping down on the tire or wheel?
>
> A. I remember conversations to that nature, but I don't recall the spring being -- I know the spring wasn't broken. In fact, there is no way it was broken, because I wouldn't have had a spring to replace it with.
>
> . . . .
>
> Q. So, that the brake assembly was never changed on the bike?
>
> A. Correct.
>
> Q. So, that brake assembly, as we are sitting there looking at the bike, was the same one that was on the bicycle at the time of the accident?
>
> A. Correct.

(R. 499 & 512-513)(emphasis added).

Although Plaintiff admitted, by way of his attorney's affidavit, that he "cannot produce evidence of the actual defect" (R. 591), he tried to overcome this defect and avoid summary judgement by arguing that a genuine issue of material fact existed because BC's owner, Philip Blomquist, allegedly admitted to the Plaintiff that there was a "malfunction" in the bike.[2] However,

---

[2] In his deposition, Plaintiff testified that Mr. Blomquist indicated to him that "[t]here was a malfunction, in essence, of the front braking system that caused the accident. (R. 533).

even if it is assumed, arguendo, that Mr. Blomquist admitted that a "malfunction" caused the accident, such an admission is immaterial in the context of BC's summary judgement motion because a malfunction is not the equivalent of a "defective and unreasonably dangerous" condition. A "malfunction" occurs when something "functions badly or imperfectly." The definition of "defective" is "falling below the accepted standard in regularity and soundness of form or structure." Webster's Third New International Dictionary (1976).

Consequently, the trial court properly concluded that BC's alleged admission of a malfunction was "immaterial" and, pursuant thereto, granted BC's summary judgement motion because the Plaintiff had a duty to respond to BC's motion with a Prima Facie case that the product was "defective and unreasonably dangerous," not that it merely malfunctioned. (R. 679, Para. 5; R. 681, Para. 5).

C. Experts For Both Parties Agree That The Alleged Defect In The Front Brake Is Not A Probable Cause Of The Alleged Accident.

Only two conclusions can be drawn from the evidence in the record regarding the implications of the broken or lost brake spring referred to by Plaintiff in his Complaint (R. 003): (1) the loss of the spring would not cause the bike to come to an immediate stop; and (2) assuming, arguendo, that the brake spring "popped" off as alleged by Plaintiff, the loss of the spring would not cause

the front brake to close on the rim, but instead, would probably result in the brake pads pulling away from the rim.

BC's expert, Stephen Henich, testified, by way of affidavit, that "if the front brake spring were to malfunction, it would not cause the front tire to instantaneously stop." (R. 506, Para. 8(b)).

CBC's expert, Ronald Jay Fisher, testified, by way of affidavit, that "[t]he single brake pad up against the rim described by Brian Burns in his deposition would not cause the wheel to stop, thereby throwing the rider head over heels, off of the bicycle." (R. 484, Para. 7(b)(i)).

Plaintiff's expert went a step further than either CBC or BC's experts and told Plaintiff and his friend, Todd Bradford, that if the spring actually "popped off" as the Plaintiff alleged in his Complaint, the brake would probably do the exact <u>opposite</u> of what Plaintiff alleged, to wit: the brake pads would separate away from the rim and such an occurrence, in his opinion, was not a "probable cause" of the accident: Specifically, Mr. Bradford testified:

> Q. What did he say, a spring malfunctioning, or what was his explanation as to how a spring malfunctioning might cause the brake to lock up the front wheel without the brake being activated?
>
> A. Well, he didn't think that would be the cause.
>
> Q. Pardon?
>
> A. <u>He didn't think that was the cause</u>.

Q. Oh.

A. He said if a spring broke, probably released the other way, the brakes would not go in, they'd go out.

Q. So he discounted a spring malfunctioning as being the cause of the accident?

A. In his opinion, he said that he didn't think that was a probable cause.

(R. 499-500)(emphasis added).

In Freed Finance Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1983), the Utah Supreme Court held that a party may not rely upon allegations in the pleading to counter affidavits made upon personal knowledge stating facts contrary to those alleged in the pleadings. Furthermore, even though summary judgment is reserved for only the most clear cut negligence cases, as pointed out by Plaintiff, this Court has previously stated that if there is no factual support for the allegations, summary judgment should be affirmed. Specifically, in Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445 (Utah App. 1989), this Court said:

> Although it is true that summary judgment is reserved for only the most clear-cut negligence cases, bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude entry of summary judgment.

Id. at 446 (quoting Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980)(emphasis added)).

In this instance, there is no physical evidence, no testimony based on personal knowledge and no expert testimony which supports

Plaintiff's allegation that the front brake spring "popped off" or caused the front tire to lock and cause the bike to come to an instantaneous stop. Instead, there are only unsupported allegations and Plaintiff's "feel[ing]" that something was wrong with the front brake. (R. 156).

The case at hand is much like the case of Brooks v. Colonial Chevrolet - Buick, 579 So.2d 1328 (Ala. 1991). In Brooks, a husband and wife brought a products liability action against the manufacturer, General Motors, and a negligent repair cause of action against the dealer, Colonial Chevrolet - Buick. With regard to the products liability cause of action, the plaintiffs claimed a defect in the braking system of the vehicle caused or contributed to two accidents in which they were involved. As in Utah, in order to establish a prima facie case of products liability in Alabama, plaintiffs must prove that their "injuries and damages proximately resulted from the product's failure of performance causally related to its defective condition." Id. at 1332.

In opposition to General Motors motion for summary judgment, the plaintiffs in Brooks, like the Plaintiff in the instant matter, did not produce any expert testimony that the subject accidents were caused by a defective condition with the brakes. Rather, they relied on circumstantial evidence and a statement attributed to Colonial's service manager by the Plaintiffs that "there's

something wrong with the car, but we don't know how to fix it." Id. at 1330. However, despite this alleged admission by the defendants' service manager, the trial court granted defendants' motions for summary judgment and held:

> This court finds as a result of all the information provided that the technical and mechanical issues involved in [the Brookses'] allegations are of such a nature that [the Brookses'] cannot make out a prima facie case and meet their burden of proof without the submittal of expert testimony with respect to the claims against both [GM and Colonial.]

Id. at 1329-30, (modifications in original).

On appeal, the Alabama Supreme Court sustained the trial court's ruling and specifically concluded:

> [T]he manufacturer of a product is not an insurer against all kinds of harm that might be caused by the use of a product, and the manufacturer or designer is not obligated to produce an accident-proof or injury-proof product.
>
> * * *
>
> [T]he failure of a product does not presuppose the existence of a defect. The fact that someone was injured while using a product does not establish that the product was unreasonably dangerous when put to its intended use.
>
> * * *
>
> The only evidence the Brookses presented concerning a defect in design was their own testimony as to the alleged defectiveness of the brakes and as to the alleged injuries they suffered as a result. Such evidence as to the cause of a product failure amounts to mere speculation and conclusory statements; without more, it is insufficient to prove a prima facie case . . .

Id. at 1330 - 33 (emphasis added).

The case at hand presents an even more compelling case for summary judgment than Brooks because the Plaintiff in the instant matter has failed to produce: (1) any evidence in the form of personal knowledge supporting his allegation that the Brake spring "popped off"; (2) any expert testimony which would indicate that the front tire would lock-up if the Brake spring "popped off;" or (3) that his accident was otherwise caused by a defect in the front brake of the Bike. Conversely, the fact of the matter is that the Plaintiff consulted with an expert and that expert informed him that the Brake was not the "probable cause" of the accident (R. 499-500).

Thus, contrary to Plaintiff's attorney's testimony in his affidavit offered in opposition to BC's motion for summary judgement wherein he stated that he could not obtain affidavits from experts opposing BC and CBC's motions for summary judgment,[3] the fact of the matter is Mr. Wells chose not to use his expert's testimony because it contradicted Plaintiff's theory of liability.

Plaintiff's case is based on nothing more than unsubstantiated speculation and, quoting the Plaintiff himself, something he "feel[s]". (R. 156). In accordance with the authorities cited above, summary judgment in favor of BC should be affirmed.

---

[3] See R. 590 - 591.

POINT II

PLAINTIFF'S BREACH OF IMPLIED WARRANTY CAUSE OF ACTION SHOULD FAIL FOR THE SAME REASON AS HIS PRODUCTS LIABILITY CAUSE OF ACTION

In Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 1979), the Utah Supreme Court acknowledged that:

> The elements of both actions [i.e. products liability and breach of implied warranty] are essentially the same and analysis for purpose of determining defenses to breach of implied warranty parallels that for strict products liability. Therefore, the same defenses discussed under strict products liability are available under breach of implied warranty.

Id. at 159. (emphasis added).

In light of Hahn, Plaintiff's cause of action for breac implied warranty should fail for the same reasons that his prod liability cause of action fails.

POINT III

PLAINTIFF'S CAUSE OF ACTION BREACH OF EXPRESS WARRANTY SHOULD FAIL BECAUSE THERE IS NO EVIDENCE OF A DEFECTIVE FRONT BRAKE

Presumably, the basis for Plaintiff's breach of exp warranty cause of action against BC are oral representations regarding the quality of the Bike made by Phil Blomquist, the o of BC. Specifically, Plaintiff testified that he and Mr. Blomq discussed the following matters during the sales process:

> Q. What if anything did he tell you about this bike?
>
> A. Well, I remember kind of how he sold me on it was that the frame was unique to other bikes as far as the strength in it and the crank that it had, that would not flex, also that the frame and the crank

> itself would give me the most direct power to the rear wheel, and the brakes were the latest thing out, and then the weight, it was light even though it had this super strong frame.

(R. 502).

However, the record is devoid of evidence that the Bike's frame, crank, or brakes were defective, improperly assembled, malfunctioned or operated inconsistently with any of Phil Blomquist's representations. Consequently, Plaintiff's breach of express warranty was properly dismissed.

POINT IV

BECAUSE PLAINTIFF FAILED TO DEMONSTRATE THAT THE SUBJECT ACCIDENT WAS CAUSED BY A DEFECT IN THE BICYCLE, HIS NEGLIGENT ASSEMBLY CAUSE OF ACTION WAS PROPERLY DISMISSED

It is well recognized that the mere fact an accident occurred, considered alone, does not support an inference that a defendant was negligent. See Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315 (Utah 1951); Horsley v. Robinson, 186 P.2d 592 (Utah 1947); JIFU 16.6. As there is no evidence that the subject bicycle was defective at the time of the accident or that a defect was the proximate cause of the accident, Plaintiff's negligent assembly cause of action was properly dismissed by the trial court.

POINT V

PLAINTIFF'S SPOLIATION CLAIM FAILS BECAUSE THERE IS NO EVIDENCE IN THE RECORD INDICATING THAT THE ALLEGED DEFECT IN THE BRAKE COULD HAVE CAUSED THE SUBJECT ACCIDENT AND THERE IS NO EVIDENCE THAT BC INTENTIONALLY DISCARDED THE EVIDENCE

An examination of Plaintiff's spoilation argument reveals that his argument is without merit.

First, Plaintiff incorrectly asserts in his brief that:

> As a general rule, the destruction of or spoilation of relevant evidence raises and inference that the evidence would have been unfavorable to the case of the spoliator. [citations omitted].

(Plaintiff's Brief, p. 16).

Second, Plaintiff couples his interpretation of the law with a misstatement of the trial court's position when he asserts that the trial court found admissible evidence to support the claim that BC (through Mr. Blomquist) admitted a "defective" part was discarded. (Plaintiff's Brief, p. 16).

A. The Trial Court Granted BC's Motion For Summary Judgement Because Even If It Was Assumed That The Brake Assembly Was Discarded, There Was No Evidence To Support Plaintiff's Claim That A Defect In the Brake Could Cause The Subject Accident.

The trial court's order of summary judgment stated, in pertinent part, that:

> Plaintiff's counsel acknowledged during oral argument that he could not prove any specific defect of the braking assembly of the bicycle without the alleged missing part. Therefore, the court finds that the Plaintiff cannot prove a products liability, breach of implied warranty, breach of express warranty or negligence cause of action against The Bicycle Center.

* * *

> Plaintiff cannot prove a case of spoliation of evidence under the facts of Plaintiff's case without obtaining expert testimony stating that the missing part could have, under the circumstances, produced the accident described by Plaintiff if the part were defective and unreasonable dangerous or negligently installed.
>
> The Plaintiff did not produce any such expert testimony. Therefore, the court holds that Plaintiff has not established a factual basis for his claim of spoliation of evidence
>
> * * *
>
> The record before the court contains admissible evidence to the effect that the brakes on Plaintiff's bicycle malfunctioned, and that the malfunction caused the accident. The court concludes that this evidence is not material, and, therefore, does not create a material issue of fact. (R. 682-683)(emphasis added).

The trial court demanded that the Plaintiff introduce competent evidence that would show that the part purportedly discarded was, in some manner, material to the establishment of the Plaintiff's assorted causes of action. However, not only did the Plaintiff fail to introduce any expert testimony showing how the allegedly discarded part, if defective, could have caused the accident, the Plaintiff did not introduce any material evidence in support of any cause of action set-forth in his Complaint.[4]

B. In Order To Obtain A Favorable Inference Under A Theory Of Spoilation, There Must Be Evidence That The Spoliator Had Notice Of A Duty To Preserve the Evidence.

---

[4] As pointed out previously, this is not simply a case where the Plaintiff could not find an expert who could support Plaintiff's theory of liability. Conversely, Plaintiff contacted and expert and was advised that a defect in the brake assembly was not a "probable cause" of the alleged accident. (R. 499-500).

The cases cited by Plaintiff in support of his assertion that the "general rule"[5] is that "the destruction of or spoilation of relevant evidence raises an inference that the evidence would have been unfavorable to the position of the spoliator"[6] do not apply to the above-captioned matter.

In each case cited by Plaintiff, the alleged spoliator had notice of the opposing party's claim and, nevertheless, destroyed documents and/or evidence essential to the proper adjudication of outstanding claims. As a result, the court concluded in each case cited by the Plaintiff that the destruction of the evidence was "purposeful," "wrongful" and/or "illegal."

For example, Plaintiff cites the case of National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987). In Turnage, the plaintiff sought sanctions against the Veteran's Administration ("VA") because of the destruction of discoverable documents. The VA had been involved in litigation for more than three years and knew the destroyed documents were responsive to outstanding discovery requests of the plaintiff. Thus, Turnage is distinguishable from the instant matter in three significant respects: (1) the destroyed evidence in Turnage was destroyed long after litigation had commenced whereas the evidence allegedly

---

[5] Plaintiff's Brief, p. 16.

[6] Id.

discarded in the instant matter was discarded years before litigation was threatened or contemplated by the Plaintiff; (2) the evidence destroyed in Turnage was directly responsive to outstanding discovery requests whereas, in the instant matter, there were not only no outstanding discovery requests when the part was allegedly discarded by BC, but, as indicated previously, litigation had not been commenced or even contemplated by Plaintiff; and (3), because the defendant in Turnage destroyed documents that were responsive to outstanding discovery requests, the plaintiff was seeking sanctions against the VA pursuant to Rules 11 and 26 of the Federal Rule of Civil Procedure whereas the Appellant in the present matter was attempting to create a genuine issue of material fact in hopes of defeating summary judgment.

Thus, in view of the differences between the instant matter and Turnage, it is no wonder that the Plaintiff omitted from his brief the court's explanation as to why it permitted an inference that the destroyed evidence would have favored the plaintiff. In pertinent part, the court stated:

> [T]he defendant knew of should have known that these destroyed materials were relevant and discoverable. After more than three years of litigation, the VA can hardly assert that it was not on notice of the issues involved in this lawsuit. It is no defense to suggest, as the defendant attempts, that particular employees were not on notice. To hold otherwise would permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping employees ignorant. The obligation to retain discoverable materials is an affirmative one; it requires that an agency or

> corporate officers having **notice of discovery obligations** communicate those obligations to employees in possession of discoverable materials.

Id. at 557-58 (emphasis added).

Similarly, in relying on Nation-wide Check Corp. Inc. v. Forrest Hills Distributors, Inc., 692 F.2d 214 (1st Cir. 1982), the Plaintiff again failed to note that Nation-wide involved a situation where, 10 days after the litigation was commenced, the defendants elected to discard all documents in their possession which would have facilitated the plaintiff's case.[7] In explaining the favorable inferences subsequently granted to the plaintiff, the court stated:

> The inference depends, of course, on a showing that the party had **notice** that the documents were relevant at the time he failed to produce them or destroyed them. The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has **notice** that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document.
>
> * * *

---

[7] Specifically, the court in Nation-wide stated "[the defendant] knew as early as December 1974, from his communications with Nation-wide's attorney, that the business records might be needed to trace the money order funds into the hands of the assignees." The court concluded that while [the defendant] had not acted in actual bad faith, he had "intentionally discarded" the documents "in knowing disregard of the plaintiff's claims." Id. at 217 (emphasis added).

> The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.

Id. at 218 (emphasis added).

In May v. Moore, 424 So. 2d 596 (Ala. 1982), a medical malpractice - wrongful death action, the court allowed a favorable inference in favor of the plaintiff because "[p]roof may be made concerning a party purposefully and wrongfully destroying a document which he knew was supportive of the interested opponent." Id. at 603 (emphasis added).

Finally, even if we were to assume, arguendo, that the Plaintiff was able to show that BC intentionally and willfully discarded the allegedly defective Brake assembly, BC would, nevertheless, be entitled to summary judgment because the Plaintiff has failed to introduce any other evidence which might support the causes of action set-forth in his complaint. American Jurisprudence states:

> Such a presumption or inference arises, however, only where the spoliation or destruction was intentional, and indicated fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.
>
> * * *
>
> While the spoliation of evidence may raise a presumption or inference against the party guilty of such act, **it does not relieve the other party from introducing evidence tending affirmatively to prove his case, insofar as he has the burden of proof.** This presumption or inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's cause.

Am. Jur. 2d. Evidence §177, 220-21 (citations omitted)(emphasis added).

In the case at bar, Plaintiff's spoliation claim fails because the evidence is that Mr. Blomquist and BC were only asked to repair the Plaintiff's bicycle. (R. 558). There is no evidence in the record that: (1) BC intentionally or willfully destroyed evidence; (2) anyone asked Mr. Blomquist to retain any parts he may have replaced in repairing the Bike; (3) BC was aware that Plaintiff was contemplating litigation at the time he requested the repairs; or (4) the Plaintiff has any other information to support his claims that the defective part which was allegedly discarded proximately caused the accident.

Based on the foregoing, the Plaintiff cannot state a Prima Facie case of spoilation of evidence against BC and, as a result, this Court should affirm summary judgment in favor of BC.

POINT VI

THE PLAINTIFF FAILED TO SHOW GOOD CAUSE AND EVIDENCE OF SPECIFIC DAMAGE LIKELY TO RESULT FROM DISCLOSURE OF BUSINESS RECORDS.

In reviewing a trial court's conclusion of law, the Court of Appeals applies a correction of error standard and gives no deference to the trial court. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989), granted 779 P.2d 688, affirmed 788 P.2d 520 (1990).

The basis for the Plaintiff's Motion for Protective Order is two-fold: First, Plaintiff contends that he is entitled to a

protective order pursuant to Rule 26(c)(7) of the Utah Rules of Civil Procedure. (R. 375). Rule 26(c)(7) states "[t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. . ." Utah R. Civ. P. 26(c)(7).

Second, Plaintiff contends that he is entitled to a protective order based on a stipulation agreed to by the parties during the Plaintiff's deposition. (R. 375)

However, Plaintiff's arguments are without merit. First, Plaintiff is not entitled to a protective order under Rule 26(c)(7) because he has not shown "good cause" as required by the Rule 26(c). Second, in arguing that the parties stipulated that "[a]ll information received from Dr. Burns and Burns Chiropractic Clinic regarding business practices" was to be kept confidential, Plaintiff misstates the actual stipulation agreed to by the parties during Plaintiff's deposition.

A. In Order To Obtain A Protective Order Pursuant To Rule 26(c) Of The Utah Rules Of Civil Procedure, The Moving Party Must Show Good Cause.

Rule 26(c) specifically provides that:

> [U]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression,or undue burden or expense . . .

Utah R. Civ. P. 26(c) (emphasis added).

The critical language in Rule 26(c) is "for good cause shown." Despite the requirement that the moving party show good cause, the Plaintiff's Motion for Protective Order did not provide any information explaining why the business records of Burns' Chiropractic Clinics should be kept confidential. (R. 378). The Plaintiff's Motion for Protective Order made no showing of "good cause" whatsoever, but merely requested protection pursuant to Rule 26(c)(7) without any elaboration whatsoever. (R. 378).

In Turick by Turick v. Yamaha Motor Corp., USA, 121 F.R.D. 32 (S.D.N.Y. 1988), the defendants moved to dismiss a protective order and to compel discovery in a products liability action arising out an accident involving an all-terrain vehicle. In that case, the defendant made a Motion for a Protective Order, pursuant to Rule 26(c) of the Federal rules of Civil Procedure, ostensibly to limit the dissemination of its purported trade secrets and other confidential research, development, and commercial information that may have been produced during litigation. However, The District Court held that "[p]urported trade secrets and other confidential commercial information enjoy no automatic protection from disclosure. Id. at 35 (citing United States v. IBM, 67 F.R.D. 40, 42, n.1 (1975) (emphasis added). The court went further and noted that:

> In order to show that certain designated information should be protected under Rule 26(c) this court requires the party seeking such a protective order to show: (1) that the information rises to the level of a trade secret [citations omitted], and (2) that there is good cause to

> protect the information [citations omitted]. Fed. R. Civ. P. 26(c).
>
> To determine whether the information a party seeks to protect rises to the level of trade secret this court has adopted the following factors set forth in Section 757 of the Restatement of Torts: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; and (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 35 (quoting United States v. IBM, 67 F.R.D. 40 (1975)).

In elaborating on the public policies underlying these factors, the court said:

> The requirement of good cause is based upon one of the fundamental premises of discovery: Discovery is to be conducted in the public unless compelling reasons exist for denying the public access to the proceedings. (citations omitted). In this court, to show good cause a party must demonstrate that disclosure of allegedly confidential information will work a clearly defined and very serious injury to his business.

Id. at 35 (emphasis added).

In denying the defendant's motion for a protective order, the court concluded that the defendant "merely made conclusory allegations" in an attorney's affidavit, that disclosure of highly sensitive trade secret materials would hurt the defendant's competitive position in the ATV market. Id. at 35.

Consequently, the court held that the defendant did not make the requisite showing that the information rose to the level of trade secret or that there was good cause shown for the protective

order pursuant to Fed. R. Civ. P. 26(c), and therefore denied the plaintiff's Motion for Protective Order. Id.

The case at bar presents a situation that is quite similar to Turick. Here, the Plaintiff has merely made conclusory assertions that the business records for the Burns' Chiropractic Clinics contain trade secrets and confidential business practices that allegedly require protection. (R. 378). The Plaintiff does not show any "good cause" by demonstrating how the disclosure would injure his business. (R. 378). The party seeking a protective order has the burden of proof of showing good cause for the order. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 890 (E.D. Pa.)(1981); Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 479 (S.D.N.Y. 1982). In the case at bar, it is apparent that the Plaintiff has not met his burden of proof. The plaintiff "cannot generally rely upon his conclusory statements, but must present evidence of specific damage likely to result from disclosure," Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21, 22-23 (S.D.N.Y. 1971).

In Zenith Radio Corp., the court noted that:

> [i]t has also been held that the specific instances where disclosure will inflict a competitive disadvantage should be set forth in more than the briefs or the hearsay allegation of counsel's affidavit, for a protective order should not issue on that basis alone.

Zenith Radio Corp., 529 F. Supp at 891. (emphasis added).

Therefore, based upon the foregoing case law, this Court should find that the trial court abused its discretion when it

granted Plaintiff's Motion for Protective Order without the requisite showing of "good cause" and evidence of specific damage likely to result from disclosing the business records of Burns' Chiropractic Clinics. BC respectfully requests that this court reverse the trial court's issuance of a Protective Order in favor of the Plaintiff.

B. The Plaintiff Misstates The Scope Of The Stipulation Between The Parties In Asserting That All Business Records Of The Plaintiff Were To Be Kept Confidential.

The issue of confidentiality was first raised during the deposition of the Plaintiff on April 19, 1991. After a discussion off the record wherein the parties agreed to what matters were to be kept confidential, the parties then went back on the record and stated their agreement. Specifically, the parties memorialized the stipulation as follows:

> Mr. Wells: I think we are getting into a situation where we are going to have some protection if we are going to talk about this stuff.
>
> Mr. Hansen: I would agree that what your client tells me, his secrets of good management, not be divulged to any other person with the exception of the insurance carrier, State Farm, expert witnesses whom we may retain and members of my office staff and attorneys who are involved in this litigation.
>
> Mr. Wells: Would you agree to seal the deposition except for those persons?
>
> Mr. Hansen: I would agree to seal the deposition.
>
> Mr. Wells: It will only be used at trial for impeachment purposes or whatever other purposes are allowed by the rules and that it will not be shown to or the testimony divulged to anyone other than the people that you have mentioned and your carrier of course.

Mr. Ferguson: I will stipulate to that, to this portion of the deposition being sealed.

Mr. Hansen. So Will I.

[An off the record discussion was held]

Mr. Hansen: Let's go back on the record then and let me restate what I understand the agreement is. With respect to the deposition from this point forward, it is agreed by all counsel and the deponent that the deposition from this point forward will be sealed with the exception of the employees of State Farm, employees of Aetna Insurance, employees of the law firm of Morgan & Hansen, employees of the law firm of --

Mr. Ferguson: Williams & Hunt.

Mr. Hansen: and also expert witnesses excluding from the definition of expert witnesses another chiropractor. It's also agreed that before this portion of the deposition is presented to an expert witness chiropractor, that we will obtain a court order from the court allowing us to present this information to a chiropractor, unless of course, you would stipulate to that, but that's up to you. Is that agreed?

Mr. Wells: And with the caveat that the people who by definition are allowed to see this will --

Mr. Hansen: We will take the responsibility to advise them.

Mr. Wells: -- will also be bound not to disclose the contents to any person to whom it is not allowed to be shown by the terms of the stipulation.

Mr. Hansen: Correct.

Mr. Ferguson: Agreed.

(R. 384-385 & 420-422) (emphasis added).

As set forth above, the terms of the oral stipulation entered into by counsel on the record during Plaintiff's deposition on April 19, 1991, pertained only to the sealed portion of the deposition and did not encompass all business and or financial

records which may and, in fact, were produced in response to subsequent discovery. Nevertheless, in moving for a protective order, some six months later, on October 29, 1991, Plaintiff represented to the court that the parties had entered into a stipulation pursuant to which the parties agreed to keep "[a]ll information received from Dr. Burns or Burns Chiropractic Clinic regarding business practices would be used only in conjunction with the litigation" and would otherwise be kept confidential. Specifically, Plaintiff's counsel testified, by way of affidavit dated December 5, 1991, that:

> At the deposition of Brian Burns held April 19, 1991, counsel for defendant agreed, in on the record and off the record discussions, that if Dr. Burns would agree to divulge information on his business practices the information would be treated as confidential.
>
> Counsel agreed that with respect to business information provided, counsel would treat the information as follows:
>
> a) All information received from Dr. Burns or Burns Chiropractic Clinic regarding business practices would be used only in conjunction with the litigation.
>
> b) Such information would only be revealed or shown to attorneys, paralegal and expert witnesses working the case and would not be revealed to clients.
>
> c) The attorneys, paralegal and expert witnesses to whom information is given shall be bound by the terms of the stipulation and any order of the court entered pursuant to this stipulation.
>
> When litigation is complete all records produced or information received is to be returned to plaintiff and/or destroyed.

(R.435-436; See also R. 378-379).

In comparing the discussion of each parties attorney during the deposition of Plaintiff and the affidavit subsequently filed by Plaintiff's counsel in support of Plaintiff's motion for a protective order, it is clear that Plaintiff misstates the agreement of the parties. Accordingly, because the parties only agreed to seal a portion of the deposition, and not all documents produced in the normal course of discovery, Plaintiff is not entitled to a protective order because of the stipulation set-forth in Plaintiff's deposition.

POINT VII

THE PLAINTIFF HAS WAIVED ANY CLAIM FOR CONFIDENTIALITY IN THE DOCUMENTS BY PRODUCING THEM IN ADVANCE OF A PROTECTIVE ORDER.

Utah Rule of Civil Procedure 26(c) contemplates that a protective order will be issued before the materials sought to be protected are produced. Specifically, Rule 26(C)(7) states "that a trade secret or other confidential research, development, or commercial information not be disclosed . . ." Utah R. Civ. P. 26(c)(7).

In the case at bar, the discovery took place in August and September of 1991. (R. 398). The Motion for Protective Order was not filed until October 29, 1991, long after the Plaintiffs business records had been produced. (R. 397).

In Gold Standard v. American Resources, 805 P.2d 164 (Utah 1990), the Utah Supreme Court held that the defendant (Getty) waived its work product protection by inadvertently disclosing

information to the plaintiff. The Court noted that by voluntarily producing memoranda in response to plaintiff's demand for production of documents, the defendant waived his right to the protection afforded work products. Id. at 171. In that case, which is analogous to the case at bar, the defendant waited to file its Motion for Protective Order until after the documents were already produced to the plaintiff. The court stated that "[t]he inaction and delay in filing constitute an independent waiver of whatever right Getty may have been able to assert, and the trial judge should have so found." Id. at 172.

Although Gold Standard involved work product protection, the analogy can be made that by failing to demonstrate diligence in procuring a protective order for confidential information, disclosing such information prior to securing a protective order, is in fact a waiver of that privilege. And in the case at bar, that is exactly what the plaintiff did by not procuring a protective order prior to disclosing the business records of Burns Chiropractic Clinic.

POINT VIII

THE COURT AND COUNSEL, AS OFFICERS OF THE COURT, HAVE A DUTY TO DISCLOSE TO THE APPROPRIATE AGENCIES, INFORMATION FOUND IN DOCUMENTS PRODUCED, WHICH PROVIDES A PRIMA FACIE CASE OF THE VIOLATION OF THE LAWS OF THE STATE OF UTAH.

In the Plaintiff's deposition taken on April 19, 1991, the Plaintiff was asked by defense counsel the following questions and gave the following responses:

Q: Do you have any type of partnership arrangement with Dr. Morrow?

A: No.

Q: Any fee sharing arrangements?

A: No. We were originally going to, but it didn't pan out. (R. 414).

The documents which the plaintiff seeks to keep confidential illustrate that Burns Chiropractic Clinics, Inc., paid to, or received from Dr. Morrow the following amounts in the following years:

1988: $52,383.91 [Burns to Morrow]

1989: $43,170.00 [Morrow to Burns]

$ 1,309.70 [Burns to Morrow]

1990: $38,302.68 [Morrow to Burns]

The documents show that a portion of this money was paid pursuant to a fee-sharing agreement. The fee-sharing agreement was that Dr. Burns paid Dr. Morrow 20% of the fee he received from the patients who were referred by Dr. Morrow to Dr. Burns. (R.400).

This type of fee-sharing arrangement is in violation of State statute, which the Department of Professional Licensing will investigate and, if determined to be accurate, will prosecute. The penalty that may be issued by the Board of Professional Licensing includes suspension, revocation, or refusal to renew any license.

The statute that applies to a chiropractor is 58-12-53(15) (1990), which provides as follows: "Unprofessional conduct" in relation to the practice of chiropractic, includes:

> (15) Any conduct or practice, contrary to the recognized standards of ethics of the chiropractic profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety or the patient or public, or any conduct, practice or condition which does or might impair the ability to practice chiropractic safely and skillfully.

Utah Code Ann. 58-12-52 (1990), provides as follows in pertinent part:

> (1) The director of the division, upon the written recommendation of the board, may suspend, revoke or refuse to renew any license to practice chiropractic in this State, or may place the licensee on probation in the following cases:
>
> (a) If the applicant or licensee is not of good moral character or has been guilty of unprofessional conduct;

With respect to Dr. Morrow, who is an orthopedic surgeon, the following statutes apply:

Utah Code Ann. 58-12-35(1) (1990).

> (1) The director upon the written recommendation of the board, shall deny an application for a license to practice medicine or shall discipline a physician licensed or otherwise lawfully practicing in this State in the following cases:
>
> (a) If the applicant or licensee is not of good moral character or has been guilty of unprofessional conduct as defined in this Act;

Utah Code Ann. 58-12-36(9) (1990) provides in relevant part as follows:

> "Unprofessional conduct" as relating to the practice of medicine includes:

> (9) Aiding and abetting the practice of medicine by one not licensed or by one whose license is suspended; or practicing as a partner-agent, or employee of, or in joint venture with, any person who does not hold a license to practice medicine within this State;

Attached as Exhibit "A" is a letter from the Department of Professional Licensing stating that a fee-sharing agreement between a physician and chiropractor is a violation of Utah law, which the Department of Professional Licensing will investigate, and where appropriate, prosecute. The documents which Plaintiff attempts to keep confidential provide the basis for the Department of Professional Licensing to investigate and prosecute both Dr. Burns and Dr. Morrow.

"Lawyers, including judges, have a duty to report unprofessional conduct to the appropriate authorities." See Blacknell v. State, 502 N.E. 2d 899. The Code of Judicial Administration states in pertinent part:

> Cannon 3 - A judge should perform duties of the office impartially and diligently.
>
> (A) Adjudicative Responsibilities
>
> (1) A judge should be faithful to the law and maintain professional competence in it.

The Court and counsel for the defendants have a duty, as officers of the court, to disclose to the appropriate authorities, information found in documents produced which states a prima facie case of unlawful activity. As officers of the

court, the trial judge and respective counsel must be faithful and uphold the laws of the State of Utah.

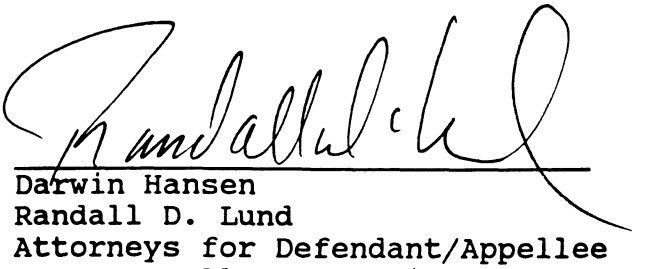
Because these same documents call into question the truthfulness of Dr. Burns' statement in his deposition that there was no fee sharing arrangement between he and Dr. Morrow, these documents should also be forwarded to the Salt Lake County Attorney's Office for their review on the issue of whether or not Dr. Burns should be prosecuted for perjury.

CONCLUSION

BC respectfully submits that the trial court's granting of summary judgment in its favor should be affirmed. BC also requests that this Court overturn the trial court's protective order.

Respectfully submitted this 30th day of March, 1993.

MORGAN & HANSEN



Darwin Hansen
Randall D. Lund
Attorneys for Defendant/Appellee
Cross-Appellant The Bicycle Center

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of March, 1993, I caused a true and correct copy of BRIEF OF THE APPELLEE/CROSS-APPELLANT to be hand delivered to:

Gary B. Ferguson
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145
Attorneys for Defendant/Cross-Appellant

Edward T. Wells
ROBERT J. DeBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
Attorneys for Plaintiff/Appellant